

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNCLE HENRY'S INC.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 01-180-B-H
)	
PLAUT CONSULTING INC.,)	
)	
Defendant¹)	

**RECOMMENDED DECISION ON DEFENDANT'S
MOTION TO AMEND²**

Defendant Plaut moves to amend paragraph 43 of its answer to include the bases for its assertion that plaintiff Uncle Henry's Inc. ("Uncle Henry's") failed to satisfy conditions precedent to its right to recover. *See generally* Motion. For the reasons that follow, I recommend that the motion be granted.

I. Applicable Legal Standards

Pursuant to Fed. R. Civ. P. 15(a) a party must seek leave of the court to amend a pleading if either the deadline to amend has expired or the party already has amended its pleading once within the time allotted by the rule. Such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should be granted in the absence of reasons "such as undue delay, bad faith or

¹ The Complaint names as defendants Plaut Consulting Inc. ("Plaut") and EdgeWing, a division of Plaut. As Plaut points out, technically there is only one defendant inasmuch as EdgeWing was an unincorporated division of Plaut. *See* Defendants' [sic] Motion To Amend Paragraph 43 of Defendant's Answer ("Motion") (Docket No. 45) at 1 n.1. Therefore, I will follow Plaut's convention of referring to itself as "Plaut" or as the "defendant," singular.

dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . .” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

II. Context

The court’s electronic docketing entries reflect, in relevant part, that (i) the instant lawsuit was initiated on September 4, 2001 with the filing of Uncle Henry’s original complaint, (ii) on October 29, 2001 Uncle Henry’s filed an amended complaint, (iii) on November 16, 2001 Plaut filed its answer and counterclaims, (iv) on May 9, 2002 the court approved a final revision to the scheduling order setting a discovery deadline of July 24, 2002 and a motion deadline of August 9, 2002, (v) the instant motion was filed on August 30, 2002, and (vi) this case is on the November trial list.

Both the original and amended complaints contained an identical paragraph 43 titled “Conditions Precedent,” which stated in its entirety: “All conditions precedent to Uncle Henry’s right to recover as alleged herein have been performed or have occurred.” Complaint (“Original Complaint”) (Docket No. 1) ¶ 43; Plaintiff’s First Amended Complaint (“Amended Complaint”) (Docket No. 10) ¶ 43. In the corresponding section of its answer, likewise titled “Conditions Precedent,” Plaut stated simply, “Denied.” Answer and Counterclaims (“Answer/Counterclaims”) (Docket No. 12) at 15, ¶ 43. However, the answer contained, *inter alia*, the following additional provisions:

Fourth Affirmative Defense

Plaintiff’s claims are barred for failure to satisfy a condition precedent, including but not limited to Plaintiff’s failure to satisfy its performance obligations under the agreements.

² The pending motion is a dispositive pretrial matter within the meaning of 28 U.S.C. § 636(b)(1)(B), and thus I frame this as a recommended decision. *See Allendale Mut. Ins. Co. v. Rutherford*, 178 F.R.D. 1, 2 & n.2 (D. Me. 1998).

Fifth Affirmative Defense

Plaintiff's claims are barred due to Plaintiff's breach of the agreements, as more fully set forth in Plaut's Counterclaims.

COUNTERCLAIMS

COUNT I (Breach of Contract)

68. Uncle Henry's, by its conduct set forth above, breached its contractual duties to Plaut, including but not limited to the wrongful termination of the Master Agreement and Website Development Statement of Work, the failure to provide a Project Manager, team leads, and core team members to work on the project for its duration, the failure to provide leadership for and coordination of the participation by Uncle Henry's staff as reasonably necessary to timely complete its performance as required by the Website Development Statement of Work, the failure to actively participate in the project and to make available its business community and IT personnel as needed, the failure to provide EdgeWing in a timely fashion all information known or later learned that was necessary for EdgeWing to understand the services to be performed for Uncle Henry's or anything related to the system or EdgeWing's performance of its services, the failure to provide participation from its key resources that supported Uncle Henry's business and who had experience with the specific application being implemented, the failure and refusal to agree upon the requirements and specifications for the website, the failure to define and agree upon Phase I and Phase II of the work in accordance with the agreements amending, modifying, and supplementing the Website Development Statement of Work, and the failure to pay amounts due to Plaut.

Answer/Counterclaims 16, 35.

On March 12, 2002 Plaut served its first set of interrogatories on Uncle Henry's. *See* Plaintiff's Response to Defendants' Motion To Amend Paragraph 43 of Defendant's Answer ("Objection") (Docket No. 56) at 1.³ In Interrogatory No. 12 Plaut asked Uncle Henry's to state the

³ Inasmuch as Plaut does not contest any of Uncle Henry's "procedural background" facts, *see generally* Reply to Plaintiff's (continued on next page)

basis for its contention in paragraph 43 of its amended complaint that all conditions precedent to its right to recover had occurred. *Id.* On May 3, 2002 Uncle Henry's responded, in relevant part, that its basis for so asserting was that "FRCP Rule 9 provides that all conditions precedent have been performed or have occurred when such is pled and the opposing party does not specifically and with particularity deny same." *Id.* at 2. Uncle Henry's hewed to this answer in later amended and supplemental discovery responses. *Id.*

III. Analysis

In filing the instant motion Plaut seeks belatedly to address, and blunt the force, of Uncle Henry's May 2002 interrogatory stance. *See* Motion at 3. Uncle Henry's counters that Plaut's effort is too little, too late and severely prejudicial, as a result of which it should be rebuffed. *See* Objection at 2-7. The motion indeed could and should have been filed sooner, but under the circumstances, I am not persuaded that Uncle Henry's is prejudiced. Accordingly, I recommend that the proposed amendment be allowed.

"A party's belated attempt to revise its pleadings requires that a court examine the totality of the circumstances and exercise sound discretion in light of the pertinent balance of equitable considerations." *Quaker State Oil Refin. Corp. v. Garrity Oil Co.*, 884 F.2d 1510, 1517 (1st Cir. 1989).

Plaut proffers an amended paragraph 43 cut entirely from the cloth of its November 2001 answer – in fact, remarkably similar to paragraph 68 of its counterclaim. *Compare* Motion at 4-5 *with* Answer/Counterclaims at 35, ¶ 68. This fact in a certain sense cuts against Plaut. With a few strokes of its keyboard, it could have included the same verbiage in its original answer (filed in November 2001) that it seeks to incorporate now. While Plaut may have mistakenly thought in November that the

Opposition to Defendant's Motion for Leave To Amend Answer Paragraph 43 ("Reply") (Docket No. 63), I accept those set forth
(continued on next page)

answer as a whole satisfied the letter of Rule 9(c), *see* Motion at 3, that does not account for its further nearly four-month delay in filing the instant motion after Uncle Henry's called the Rule 9(c) issue to its attention on May 3, 2002.⁴

Ultimately, however, the similarity of the proffered amendment to the original answer cuts in Plaut's favor. Late as it is, the proposed paragraph adds nothing surprising. Plaut's November answer made clear the basis for its denial that conditions precedent had been met: that Uncle Henry's had itself allegedly breached the contract in a manner enumerated in Plaut's counterclaims. *See, e.g.*, Answer/Counterclaims at 16, 35 (Fourth and Fifth Affirmative Defenses; Counterclaim ¶ 68). As Uncle Henry's argues, *see* Objection at 5-6, it could not have gleaned from the answer filed in November exactly which of the enumerated breaches allegedly constituted failures to meet conditions precedent.⁵ However, there is no "surprise" breach among the subset now specified in proposed amended paragraph 43. Inasmuch as appears, the same core facts that underlie Plaut's long-extant breach of contract claims underpin its conditions-precedent defense. Thus, I cannot discern how Uncle Henry's would be "extremely" prejudiced by lack of an opportunity for discovery.

These circumstances distinguish the instant case from *Quaker State*, on which Uncle Henry's heavily relies. *See* Objection at 3-7; *Quaker State*, 884 F.2d at 1518 ("A great deal of discovery had taken place without reference to the neoteric theory [a proposed fifth counterclaim], thus prejudicing

herein as true for purposes of this motion.

⁴ Rule 9(c) requires, in relevant part, that, in pleading the performance or occurrence of conditions precedent, a "denial of performance or occurrence shall be made specifically and with particularity." As a result, "provided the complaint includes a general averment that all conditions precedent to suit or recovery have been met, and the defendant does not deny the satisfaction of the preconditions specifically and with particularity, then the plaintiff's allegations are assumed admitted, and the defendant cannot later assert that a condition precedent has not been met." *Walton v. Nalco Chem. Co.*, 272 F.3d 13, 21 (1st Cir. 2001) (citation, internal quotation marks and footnote omitted). However, Rule 9(c) does not trump Rule 15(a). To the extent amendment of an answer is proper pursuant to a Rule 15(a) analysis, a defendant is not precluded from asserting a condition-precedent defense. *See, e.g., International Paving Sys., Inc. v. Van-Tulco, Inc.*, 866 F. Supp. 682, 690-91 (E.D.N.Y. 1994) (noting propriety of grant of Rule 15(a) request to amend answer to meet requirements of Rule 9(c)).

⁵ Plaut acknowledges that it does not "contend or concede" that every breach alleged in its answer doubles as a failure to meet a condition precedent. Motion at 1 n.2.

QSOR.”); *see also, e.g., Carmona v. Toledo*, 215 F.3d 124, 136 (1st Cir. 2000) (“Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading.”) (citation and internal quotation marks omitted); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1487 at 629-32 (2d ed. 1990) (“[P]laintiff will not be sufficiently prejudiced to justify a denial of an application under Rule 15(a) if defendant is allowed to cure an insufficient defense or to amplify a defense that already has been stated in the answer. Thus, courts have allowed amendments when it was established that doing so would not unduly increase discovery or delay the trial, and when the opponent could not claim surprise, but effectively should have recognized that the new matter included in the amendment would be at issue.”) (footnotes omitted).

Finally, to the extent Uncle Henry’s suggests that even Plaut’s proffered amended paragraph 43 is insufficiently detailed to meet the “particularity” requirements of Rule 9(c), *see* Objection at 6, its argument is without merit. Proposed paragraph 43 discloses the specific subset of alleged breaches on which Plaut rests its condition-precedent defense. While Plaut adds the language, “including but not limited to,” *see* Motion at 4, Rule 9(c) would preclude the assertion of any further undisclosed alleged failures to satisfy a condition precedent.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to amend paragraph 43 of its answer be **GRANTED** and that the defendant be directed to file and serve forthwith an amended answer and counterclaim limited to an amendment of paragraph 43 of the answer, as proposed in its motion.

NOTICE

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